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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 100

W. P. BROWN & SONS LUMBER COMPANY, ET AL.,
Petitioners,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
ET AL.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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STATEMENT

A concise and accurate statement of this case is found in the opinions below of the Circuit Court of Appeals for the Sixth Circuit, 82 Fed. (2d) 94 (R. 124), and of the District Court, 7 Fed. Supp. 593 (R. 111). The decisions of the Interstate Commerce Commission in the case at bar are reported under the title *Wausau Southern Lumber Co., et al.*, v. *Alabama Great Southern Railroad Company, et al.*, 142 I. C. C. 521 (R. 87), 182 I. C. C. 731 (R. 15).

The question presented by the case was solely one of law: the proper construction of a rule in a railroad freight tariff, commonly known as the combination rule, the words in which rule were used in their ordinary sense. Both

courts pointed out that while deference should be paid to the conclusions of the Interstate Commerce Commission, they were not bound by those conclusions. Both courts held that the Commission erred as a matter of law in the construction it placed upon the rule.

Petitioners say (p. 4) that the statement of the case in the opinion of the Circuit Court of Appeals correctly recites the history of the controversy, but that the statement that the purpose of the rule was

> "to avoid the inequality between shippers having access to stations which published through rates and those which had not, the carriers published what is known as the combination or 'Jones' rule, * * *."

is a conclusion of the court and is erroneous.

This statement is not erroneous. The Commission itself said (R. 91) that the combination rule was published to avoid a double increase on certain commodities moving on combination rates, the separate factors of which had been increased by specific amounts. The plain purpose of the rule, as stated by the Circuit Court of Appeals in its opinion (R. 124),

> "was concededly to insure that a shipper whose rate was made up of two or more local rates would pay but one increase in the total through rate, just as a shipper to whom was available a published through rate from the point of origin to destination would likewise pay but one increase."

Petitioners had available published through rates from the points of origin of the shipments involved in this case to destination. The rates which petitioners would have paid had they routed their shipments via the routes over which the published through rates applied included, therefore, but one increase.

The case arose out of this fact: petitioners found that by selecting routes from the points of origin, over which routes the published through rates were not applicable,

and by applying the combination rule to the rates in effect via such routes, petitioners were able to obtain rates slightly lower than the published through rates (R. 101-103). Petitioners sought to apply the combination rule, notwithstanding the plain limitation in the rule that it could be used only where no published through rates were in effect.

Petitioners withdrew at the hearing all allegations with respect to the reasonableness of the rates (R. 89). The published through rates were found not unreasonable by the Commission on March 28, 1932 in *Southern Pine Association* v. *A. & W. Ry. Co. et al.*, 183 I. C. C. 191.

Thus petitioners sought to accomplish in the case at bar, by an unwarranted construction of the combination rule, reductions in the published through rates which the Commission itself found were not unreasonable *per se*.

THE COURTS BELOW DID NOT ERR IN THEIR CONSTRUCTION OF THE COMBINATION RULE.

The Commission in its original report in this proceeding deals briefly with the purpose of the combination rule (R. 91) and its application (R. 92). The facts surrounding the publication of the rule are set forth at somewhat greater length in the amendment to the petition (R. 84-85), and in the amendment to the answer (R. 100-106).

Three Circuit Courts of Appeal have recently considered the language of the combination rule to determine whether the Commission erred as a matter of law in construing its language, and in the decisions of these three courts will be found a detailed description of the rule and its purpose (*Hohenberg* v. *Louisville & Nashville Railroad Co.*, 46 Fed. (2d) 952, certiorari denied, 284 U. S. 617; *Wheelock, et al.*, v. *Walsh Fire Clay Products Co.*, 60 Fed. (2d) 415; *Baltimore & Ohio Railroad Co.* v. *Domestic Hard-*

woods, Inc., 65 Fed. (2d) 488). We shall consider these cases later.

The pertinent portion of the combination rule reads as follows (R. 104):

> "Where no published through rates are in effect from point of origin to destination on Lumber * * * carloads, and two or more commodity rate factors * * * are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner * * *."

Then follows the formula for determining the combination through rate and the single increase to be added to that combination rate (R. 92-93, 104-105). It is obvious that the whole purpose of the rule was to insure that shippers located at points of origin, from which points no published through rates were in effect, would pay but one increase in the total through rate.

The first question to be determined is whether there were published through rates in effect via the originating carriers on the shipments of lumber involved in this proceeding from the points of origin to their destination. The record shows that there were such published through rates in effect. (Answer, R. 56; Amendment to Petition, R. 84; Commission's Opinion, R. 89; Amendment to Answer, R. 101).

The condition stated in the rule having been met, it follows that under the plain language of the rule, it may not be applied to the shipments of lumber involved in this proceeding, on all of which shipments through published rates were in effect, applying via the originating carrier and its connections to destination.

The language of the combination rule is plain. It is unambiguous. There is not a word in the rule used in other than its ordinary sense. The rule means just what it says and ought to be interpreted just as it reads. There is noth-

ing technical about the rule. It does not contain one technical word. It is clearly and simply stated in simple language.

Tariffs are not framed by lexicographers. Nor are they framed by men given to expressing their language in recondite phrases. They are framed by men who endeavor to express the purpose and intent of the rule in the plainest, simplest, and clearest language possible. The language of the combination rule is characterized by clarity, simplicity and directness. The rules in tariffs must, moreover, be read and applied by hundreds of persons whose duties require them to quote rates and collect freight charges. Where the language of a tariff rule is plain and unambiguous, the rule ought to be construed in accordance with the plain meaning of the language used. The rule ought to be construed as it would be construed by the ordinary man who is required by his daily work to construe and apply the rule. One reading of the combination rule is sufficient to disclose what it means.

The reasoning of the Circuit Court of Appeals on this point is unanswerable (R. 127):

> "It would seem to be clear that when lumber is offered for shipment to the carrier over a designated route, the initial inquiry by the carrier under the guidance of the rule must be as to the existence of a published through fate for the shipment to its destination. If there is no such rate the formula must be applied to a reduction of the combined local rates. If there is such published through rate, the formula is not applied. There is nothing complicated about it, and the shipper having a through rate available is subjected to no unreasonable or inequitable exaction."

The courts below were right in their construction of the combination rule.

THE CASE DID NOT CALL FOR THE EXERCISE OF THE ADMINISTRATIVE DISCRETION OF THE COMMISSION. PRELIMINARY RESORT TO THE COMMISSION WAS THEREFORE UNNECESSARY AND ITS DECISION IS NOT BINDING OR CONCLUSIVE ON THE COURTS.

The petitioners argue (p. 17) that the application to the Commission in this case was not only proper but absolutely necessary. They state that chief among the questions of fact was the question whether or not the routes over which the shipments moved or should have moved were reasonable routes. The decisions of the Commission in this case show on their face (R. 16, 88, 89, 95, 96) that the Commission did not decide in this case any question involving the exercise of its administrative discretion. The Commission did not consider and dispose of any question respecting the reasonableness of the rule itself, the reasonableness of the rates under Section 1 of the Interstate Commerce Act, or unjust discrimination under Section 2, or undue preference under Section 3 (49 U. S. C. A. Secs. 1, 2, 3). And especially do respondents point out that the Commission did not pass upon or consider any question regarding the reasonableness of the routes over which the published through rates or combination rates applied, or the adequacy of such routes, their number, or their length. The Commission said (R. 89) that at the hearing all allegations with respect to the reasonableness of the rates were withdrawn except as to rates not material here, and that the question of tariff interpretation presented the principle issue for determination.

The findings of the Commission (R. 95) do not deal with any question arising under Sections 1, 2 or 3, or any question regarding the reasonableness or lawfulness of rates or routes or rules. Its findings comprehend only the determination of what were the applicable rates under the tariff, that is to say, how the tariff should be construed.

The Commission construed the language of the combination rule and held that the carriers had placed an unlawful construction upon that rule and had collected overcharges (R. 96), thus violating Paragraph (7) of Section 6 of the Interstate Commerce Act (49 U. S. C. A. Sec. 6 (7)). This paragraph requires carriers to file and publish tariffs naming their rates and forbids them from charging or demanding or collecting or receiving a greater or less or different compensation for the transportation of property than the rates, fares, and charges specified in their tariffs filed with the Commission and in effect at the time.

The petitioners quote what this Court said in *Great Northern Railway Co.* v. *Merchants' Elevator Co.*, 259 U. S. 285, that where the document to be construed is a tariff, and before it can be construed it is necessary to determine upon the evidence the peculiar meaning of words, or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission. Respondents do not dispute this principle of law. But petitioners failed to quote the conclusions of this Court in the case just cited (p. 294):

> "In the case at bar the situation is entirely different from that presented in the *American Tie & Timber Company case*, or in the *Loomis Case*. Here no fact, evidential or ultimate, is in controversy, and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. The operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary. * * *"

The task before the courts in this case was precisely the same as that in the case just cited: to determine the meaning of words in the tariff that were used in their ordinary sense and to apply that meaning to the undisputed facts.

The combination rule contains no words used in a pe-

culiar meaning, no words used in other than their ordinary sense, no words, extrinsic evidence with respect to which was necessary to determine the sense in which they were used.

The courts below were right in their conclusion that the case presented no question of fact, no question involving the exercise of the Commission's administrative discretion. The question was solely one of law involving, as it did, the interpretation of a tariff rule in which words were used in their ordinary sense only.

THE COURT BELOW DID NOT ERR IN HOLDING THAT THE DECISION OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA IN BALTIMORE & OHIO RAILROAD COMPANY vs. DOMESTIC HARDWOODS, INC., 65 FED. (2D) 488, WAS UNSOUND AND IN REFUSING TO FOLLOW THAT DECISION.

THE DECISION IN THE BALTIMORE & OHIO CASE NOT ONLY WAS PLAINLY ERRONEOUS AS A MATTER OF LAW, BUT WAS DISTINGUISHABLE FROM THE PRESENT CASE ON THE FACTS.

Petitioners quote (pp. 23-25) that portion of the opinion of the Circuit Court of Appeals setting forth its reasons for refusing to follow the decision of the Court of Appeals of the District of Columbia in *Baltimore & Ohio Railroad Company* v. *Domestic Hardwoods, Inc.*, 65 Fed. (2d) 488, in which latter case the court followed the construction that the Interstate Commerce Commission placed upon the combination rule.

There is a conflict between the decisions of the Court of Appeals of the District of Columbia in the *Baltimore & Ohio Case* and of the Circuit Court of Appeals for the Sixth Circuit in this case, respecting the construction to be placed on the combination rule. But it only requires a reading of the combination rule to see that the construction placed upon that rule by the Commission and by the Court of Appeals of the District of Columbia was erroneous as a mat-

ter of law. Respondents refer here to what they have heretofore said (pp. 3-5) on this point.

The Court of Appeals of the District of Columbia in the first place seemed to feel that the decision of the Commission was controlling, and that the court should not exercise its own and independent judgment on the question whether the Commission's construction of the rule was lawful. The court said (65 Fed. (2d) p. 492) that the carriers took the position that the Jones rule (the combination rule) is applicable only where there is no joint through rate via any route, that this the Commission held was not the correct interpretation, and that the court found itself in agreement with the Commission's conclusion,

> "though it is fair to say, if the question were one as to which the Commission had made no ruling, the determination would present more difficulty, for the language is undoubtedly broad enough to be construed as contended by the carriers. * * *"

The court went on to say that the question involves more than the mere interpretation of words, that it really goes to the interpretation and construction of railroad rates and routing, a technical subject, and as to which the Commission has expert knowledge superior to that possessed by any court.

Respondents refer again to the Commission's decisions in this case (R. 15, 87) which show on their face that the Commission did not consider any question involving the construction of rates or routing, that the Commission merely considered and construed the language of a tariff rule.

The Court of Appeals then set forth some reasons why in its opinion the construction placed by the Commission on the combination rule was not strained, unreasonable or unnatural (p. 492). The fallacy underlying all these reasons of the court is concisely stated by the Circuit Court

of Appeals in its decision in the case at bar (R. 127-128). It is sufficient here to state that the Court of Appeals of the District of Columbia seemed to proceed on the theory that the case involved some question of the reasonableness of the routes, and that the combination rule served as a means of prohibiting railroads from establishing routes unreasonably long or through congested centers, or establishing through routes impossible in practical use. The Court of Appeals wholly overlooked the fact that the power of the Interstate Commerce Commission to deal with the reasonableness of routes, to establish reasonable routes, is not found in the provisions of Paragraph (7) of Section 6 of the Interstate Commerce Act (49 U. S. C. A. Sec. 6 (7)), requiring carriers to file and publish tariffs naming their rates and requiring adherence to those rates, but is found in Paragraph (3) of Section 15 of the Act (49 U. S. C. A. Sec. 15 (3)), authorizing the Commission to establish through routes whenever it finds such through routes necessary or desirable in the public interest, and to fix the rates over such routes, as well as in Paragraph (7) of the same section, authorizing the Commission to suspend any new individual or joint rate pending investigaton as to its lawfulness.

The Court of Appeals dealt with the case as if it involved the reasonableness *per se* of the combination rule. The court overlooked the fact that the case did not call for the exercise of the administrative discretion of the Commission, and that the case presented the sole question of the proper interpretation of the language in the combination rule, a question of law alone.

The court in the *Baltimore & Ohio Case,* to paraphrase the language of this Court in *United States* v. *Missouri Pacific Railroad Co.*, 278 U. S. 269, in which this Court held that the construction placed by the Commission upon Paragraph (4) of Section 15 of the Interstate Commerce Act

(49 U. S. C. A. Sec. 15 (4)) was erroneous, conjured up conditions to raise doubts in order that resort might be had to construction, when the language was so clear that there existed no room for construction (pp. 277-278).

What we have just said answers petitioners' contentions (pp. 8, 9, 18, 25) that the decision here sought to be reviewed deprives the shipper of the right given him by Paragraph (8) of Section 15 of the Interstate Commerce Act (49 U. S. C. A. Sec. 15 (8)) to route his shipments, unless the shipper is willing to pay a double increase in his rates, and results in the closing of routes heretofore open to the shipper. The shipper has, of course, under the Act, the right to designate the routing of his shipments, but he is not entitled to an unlimited number of reasonable routes. There is no requirement in the Act that the rates over every possible route that can be worked out between two stations in the United States must be the same. Petitioners did not invoke Paragraph (3) of Section 15 of the Act which, as stated, authorizes the Commission to establish through routes when necessary or desirable in the public interest. The record shows that petitioners had available published through routes from all the stations from which they made the shipments involved in this case, and in ample number and variety (R. 101-102). The Commission's opinion did not deal at all with the establishment of routes, or their closing, or their reasonableness, or their adequacy, or the right to route, for the reason that petitioners did not raise any such issue. The only issue raised by petitioners was one under Section 6 of the Act: whether the carriers had lawfully construed the language used in a tariff rule.

There are, moreover, facts in the case at bar which distinguish it from the *Baltimore & Ohio Case*.

Respondents in the amendment to their answer (R. 106-107) set forth instances of how the construction placed by the Commission on the combination rule would have re-

sulted in violations of the long-and-short-haul clause of Section 4 of the Act (49 U. S. C. A. Sec. 4 (1)). If the Commission had construed the rule as the railroads contended it should be construed and as the courts below found it should be construed, no violations of law would have resulted. The Commission itself in its report (R. 93) refers to the contentions of the railroads that, if the tariffs had been applied as the petitioners contend, violations of the long-and-short-haul clause of Section 4 would have resulted, and the Commission itself gives an example of how these violations would have been brought about (R. 93).

All these facts were before the Commission. It had the choice of construing the combination rule in such a way as to avoid violations of the long-and-short-haul clause of Section 4 of the Act. It failed to do so.

The decision in *Great Northern Railway Company* v. *Delmar*, 283 U. S. 686, makes it plain that in failing to do so the Commission erred. In that case this Court applied to the construction of railroad freight tariffs the principle that where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law. The Commission should therefore have construed the rule in such a way as to avoid a violation of law.

The situation presented in the case at bar with respect to violations of Section 4 was not present in the *Baltimore & Ohio Case*. These facts distinguish the case at bar from the *Baltimore & Ohio Case*, and make it clear that the Commission erred as a matter of law in construing the combination rule as it did.

The courts below in the case at bar made no reference to the violations of Section 4 that would have resulted if the combination rule had been construed as the Commission construed it. Both courts apparently reached the conclu-

sion that the language of the rule was so plain and unambiguous that there was no need of considering this aspect of the case.

Respondents submit that the court below did not err in holding that the decision of the Court of Appeals of the District of Columbia in the *Baltimore & Ohio Case* was unsound and in refusing to follow that decision.

THE COURT BELOW DID NOT ERR IN FAILING TO GIVE WEIGHT TO WHAT PETITIONERS CLAIM WAS A CONTEMPORANEOUS CONSTRUCTION OF THE COMBINATION RULE.

Petitioners refer (p. 20) to the statement in the amendment to their petition that for several years after 1920 the railroads applied the combination rule, that in 1923 the southern railroads for the first time took the position that the rule did not apply in cases where there was a through rate by any route, and undertook to amend their tariffs so as to specifically so provide, but that the Commission declined to permit such an amendment. Petitioners say that on demurrer this allegation must be taken as true.

The rail carriers ever since the rule has been in effect have of course applied the rule to shipments of lumber where the rule by its terms was applicable. Petitioners' brief, moreover, shows on its face that these respondents have persistently questioned the construction placed by the Commission on the combination rule over a long period of time. Petitioners cite (p. 16) no less than nine decisions of the Commission in each of which these railroad respondents contended that the rule should be construed as the respondents here contend it should be construed. The first of these cases is *McGowan-Foshee Lumber Co.* v. *A., F. & G. Ry. Co., et al.*, 95 I. C. C. 451. This case, decided by the Commission as far back as January 12, 1925, involved a shipment moving in 1921. The case at bar involved a shipment moving in 1920 (R. 88).

The Commission itself has said that the fact that for approximately twenty-five years carriers and shippers have interpreted a tariff uniformly, is not conclusive that the interpretation is correct, but is entitled to consideration (*Thames & Co.* v. *Chesapeake & Ohio Railroad Co., et al.*, 194 I. C. C. 188, p. 189). The Commission has also said that a reasonable doubt concerning the meaning of transit tariffs warrants the interpretation which has been placed upon them by the parties (*Parkersburg Rig & Reel Co.* v. *Chicago & North Western Railway Co.*, 198 I. C. C. 709, p. 712).

But here no reasonable doubt can arise with respect to the meaning of the combination rule. An unlawful construction by either carriers or shippers of a tariff rule, plain and unambiguous in its language, does not make such construction by either shippers or carriers the lawful one. The question here before the court is whether the language of the combination rule admits of any possible ambiguity. The Circuit Court of Appeals in its opinion in the case at bar (R. 126) said that freight tariffs must be applied as written, that effect must be given if possible to every word, clause, and sentence, and that the practical construction of the parties to a contract is not permitted to defeat the clear language of the instrument, quoting what this Court said in *United States* v. *Missouri Pacific Railroad Co.*, 278 U. S. 269, p. 280, that the language of that provision of the Interstate Commerce Act there before the court was so clear and its meaning so plain that no difficulty attended its construction.

TWO CIRCUIT COURTS OF APPEAL HAVE RECENTLY HELD THAT THE COMMISSION ERRED AS A MATTER OF LAW IN FAILING TO CONSTRUE ANOTHER PORTION OF THE COMBINATION RULE IN ACCORDANCE WITH THE LANGUAGE USED.

One of the limitations attached to the use of the combination rule, as shown by two recent decisions of the Circuit Courts of Appeal (*Hohenberg* v. *Louisville & Nashville Railroad Co.*, Fifth Circuit, 46 Fed. (2d) 952, certiorari denied, 284 U. S. 617; *Wheelock, et al.* v. *Walsh Fire Clay Products Co.*, Eighth Circuit, 60 Fed. (2d) 415), is that it may be used only when the tariffs naming the freight rates themselves provide that those rates are subject to the rule. There is no question in the case at bar with respect to this limitation.

Notwithstanding the plain language contained in this limitation, the Commission held in a long line of cases that the combination rule applied to the construction of rates over two or more carriers where no published through rate was in effect, if the tariff of one carrier alone contained a reference to the combination rule. Under the rule as written, it may not be used unless all the tariffs naming the separate rates or factors making up the combination through rate refer to the rule.

The Commission in the decisions considered by the Circuit Courts of Appeal in the cases just cited did precisely what it did in the case at bar: it failed to construe the language of the rule in accordance with the plain meaning of the words used. It failed to apply a plain and unambiguous rule in the tariff as that rule was written. Both courts held that the Commission erred as a matter of law in doing so. These two decisions show that the decision of the Circuit Court of Appeals in the case at bar is right and that the decision of the Court of Appeals of the District of Columbia is wrong.

CONCLUSIONS.

The language of the combination rule is characterized by such directness, clarity and simplicity, its meaning is so plain, it is so wholly lacking in any ambiguity that, to use the language of this Court in *United States* v. *Missouri Pacific Railroad Co.*, 278 U. S. 269, there is no room for construction. The courts below were right in construing the combination rule as it was written.

Respondents respectfully submit that the petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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